INTERIOR BOARD OF INDIAN APPEALS

Cheyenne River Sioux Tribe v. Aberdeen Area Director, Bureau of Indian Affairs

28 IBIA 288 (11/24/1995)

Related Board cases:

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

CHEYENNE RIVER SIOUX TRIBE
v.
ACTING ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-49-A Decided November 24, 1995

Appeal from a decision reducing trespass damages for a cattle trespass on the Cheyenne River Sioux Reservation.

Vacated and remanded.

1. Indians: Lands: Trespass: Damages--Indians: Leases and Permits: Farming and Grazing

   Under 25 CFR 166.24(b), a Bureau of Indian Affairs Superintendent is required to take action to collect penalties and damages from the owner of cattle grazing in trespass upon trust or restricted Indian lands. The fact that the Indian landowners may have another remedy against the trespasser does not relieve the Bureau of its duties under this regulatory provision.

2. Indians: Lands: Trespass: Damages--Indians: Leases and Permits: Farming and Grazing

   Where cattle belonging to an alleged trespasser are repeatedly found in trespass upon Indian land, a willful trespass is established.

APPEARANCES: Steven C. Emery, Esq., Tribal Attorney General, Eagle Butte, South Dakota, for appellant; Priscilla A. Wilfahrt, Esq. Field Solicitor, U.S. Department of the Interior, Ft. Snelling, Minnesota, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Cheyenne River Sioux Tribe (Tribe) seeks review of a September 28, 1994, decision of the Acting Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), reducing the amount of trespass damages assessed against Jeff Hunt for cattle trespass on range unit 297 on the Cheyenne River Sioux Reservation. 1/ The Tribe states

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1/ The Area Director's decision also addressed damages assessed against Hunt for trespasses on range unit 136. The Tribe states that it does not appeal the Area Director's decision as it relates to range unit 136.

that it brings this appeal on behalf of Ted Knife, Sr., to whom the range unit is permitted. For the reasons discussed below, the Board vacates the Area Director's decision and remands this matter to him for further consideration.

Under the Tribe's Grazing Code, range units are awarded for 5-year periods. Hunt held a grazing permit for range unit 297 for the period November 1, 1988, through October 31, 1993. Knife was awarded a permit for the unit for the period November 1, 1993, through October 31, 1998. 2/ Both Hunt and Knife are members of the Tribe.

Hunt failed to remove his cattle from the range unit at the end of his term. On November 19, 1993, the Superintendent wrote to him, stating that, unless the cattle were removed by 5 p.m. on December 3, 1993, they would be considered to be in trespass. On December 6, 1993, Agency personnel observed appellant's cattle on the unit. On December 8, 1993, the Superintendent again wrote to Hunt, stating:

> You have **SEVENTY-TWO (72) HOURS FROM RECEIPT OF THIS NOTICE** to remove any and all livestock owned by you from the above mentioned Range Unit, or make other satisfactory arrangements with the Branch of Land Operations [of the Agency]. Failure to do so will result in assessing the penalties provided for in 25 CFR 166.24. These penalties may include impoundment of your livestock. [Emphasis and capitals in original.]

Although Hunt's cattle were not removed in December 1993, the Agency took no immediate action against him because appeals filed by Hunt and several others were then pending before the Area Director or the Board. These appeals included Hunt's appeal from the approval of the Tribe's Grazing Code for 1993-1998 and several appeals, including one filed by Hunt, from the denial of grazing permits under the new code. Most of the appeals reached the Board in January 1994. On January 18 and February 3, 1994, the Board placed the Area Director's decisions in the several appeals into immediate effect pursuant to its authority in 43 CFR 4.314(a). 3/

On January 31, 1994, the Superintendent wrote to Hunt, stating that, on January 24, 1994, 168 of Hunt's cattle had been observed in trespass on range unit 297. Further stating that the cattle had been in trespass since

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2/ According to a notation in the record, for the 1993-1998 period, range unit 297 includes 4,550.10 acres of tribal land and 537.40 acres of allotted land.

3/ On Feb. 9, 1995, the Board dismissed both of Hunt's appeals. It dismissed his appeal from approval of the Grazing Code for lack of standing and his appeal from denial of a grazing permit for failure to exhaust tribal remedies. Hunt v. Aberdeen Area Director, 27 IBIA 173 (1995).

November 1, 1993, he enclosed a bill for the months of November and December 1993. He continued:

> Penalties will continue to be assessed as long as your livestock remain in trespass on the Unit. * * * In this regard, you will be given until March 2, 1994 to remove your trespassing livestock from this unit. * * *
>
> The penalty fees due on the Bill for Collection have been calculated as stipulated in 25 CFR 166.24. You are being assessed $1.00/head in trespass together with the reasonable value of forage consumed based upon the average rate received per month for comparable grazing privileges on the reservation. Following is how this was calculated:
>
> a = $1.00/head
> b = reasonable value of forage consumed per head
> ($7.80/AUM (1994 Appraised Rate) X 12 months = $93.60/year
> $93.60/year divided by 365 days = $0.26/day/head)
>
> _____
>
> | | | | |
> |---|---|---|---|
> | a) | $1.00/head X 168 head | = | $ 168.00 |
> | b) | $0.26/head/day X 168 head X 61 days | = | $2,664.48 |
> | c) | a+ b TOTAL | = | $2,832.48 |

(Superintendent's Jan. 31, 1994, Letter at 1-2).

On February 24, 1994, the Superintendent wrote to Hunt, stating that Hunt's livestock were still in trespass and therefore subject to impoundment at any time without further notice.

On March 4, 1994, the Superintendent sent Hunt a bill for $2,022.02 for forage consumed for the months of January and February 1994. He stated that Hunt would be billed every 2 months until the livestock were removed from the range unit.

On March 7, 1994, Hunt appealed to the Area Director. He stated that he leased 652 acres of allotted and privately owned land and that this land was "partially fenced off separate from the rest of range unit #297" (Hunt's Notice of Appeal to Area Director at 2). Further, he stated: "Due to the hard winter with a great deal of snow cover and little grazing I have been feeding my cattle since early November and have done my best to keep my cattle on the 652 acres with supplement feeding of hay and cake." Id.

The Area Director issued a decision on April 1, 1994, reducing the damages assessed against Hunt to $168. He stated:

> All inspections on range unit 297 show your livestock were either on land leased by you or in close proximity to land leased by you indicating your attempt to keep the cattle on your land during the winter feeding period.

> We feel all records indicate an attempt, by you, to maintain control of your livestock during this past winter; however, your livestock did drift onto range units not leased by you; therefore a liquidated damage charge for the unauthorized use of this land is in order. Liquidated damages will be assessed at the rate of $1.00 per head for the maximum livestock found in any one inspection; therefore, the assessed penalty * * * shall be * * * $168.00 for range unit 297.
>
> This decision shall not be interpreted as our authorizing trespass. The Cheyenne River Sioux Tribal Grazing Code requires all range unit borders to be fenced with bordering operators sharing the cost 50/50. The frost has mostly left the ground; therefore, we highly recommend you contact the Branch of Land operations, Cheyenne River Agency, to determine fencing requirements of each operator. We further recommend that fencing be completed on or before May 1, 1994, to prevent further trespass which could result in trespass fees supported by this office.

(Area Director's Apr. 1, 1994, Decision at 2).

By memorandum of April 7, 1994, the Area Director advised the Superintendent of his decision. The memorandum explained that the trespass damages had been reduced because fencing was the shared responsibility of neighboring operators and, in this case, neither operator had complied with the requirement. It further stated: "Mr. Hunt, in our opinion, made an apparent attempt to control his livestock over the winter feeding period. Although his livestock did drift onto unpermitted range units, the forage consumed during winter feeding and caking would be minimal." 4/

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4/ The Superintendent responded to the Area Director's memorandum on May 13, 1994. He stated:

"I am in total disagreement with the rationale used to assess trespass charges especially on RU #297. You state 'Mr. Hunt, in our opinion, made an apparent attempt to control his livestock over the winter feeding period.' This is not the case, Mr. Hunt deliberately left his livestock on this unit in an area that was enclosed by fences. Due to the make up of the pasture, it is very hard to see how livestock would drift into the area. You also speak to the grazing code section requiring unit holders to share fencing of borders. Again, this area is fenced and there is no need to fence unless segments of the fence [are] removed with proper approval. * * * [T]here has been no attempt whatsoever to remove livestock from RU #297 to other lands under Mr. Hunt's control. Mr. Hunt's actions, in my opinion, are blatant and initiated as a reprisal for losing the unit in question.

"I respectfully request that you reconsider your decision of April 7, 1994 upholding Mr. Jeff Hunt's appeal and allow this agency to use our previous formula for assessing trespass fees to Mr. Hunt."

There is no evidence in the record of any response to the Superintendent's memorandum.

The Area Director did not send a copy of his April 1, 1994, decision to the Tribe. The Tribe learned of the decision on or before September 7, 1994, when it filed a notice of appeal with the Area Director. 5/ The Area Director evidently interpreted the notice of appeal as a request for reconsideration of his April 1, 1994, decision. On September 28, 1994, he issued the decision on appeal here, stating:

> During the 1993 allocation period neither of the Hunt's, Gene nor Jeff, were allocated range unit 297, the allocation went to Mr. Ted Knife, Sr. However, Mr. Jeff Hunt leases approximately 652 acres that lie within or adjacent to the enclosed boundaries of the range unit. During the period of time in question, adequate fencing did not exist between the Hunt lease land and the range unit to separate the two. Also, during the period of time in question, Mr. Hunt was feeding and watering his livestock on his lease land that lies within or adjacent to range unit 297.
>
> After a review of the livestock count records used to assess the trespass penalty, it was noted that seven of the thirteen counts reported the livestock to be located on Hunt land or immediately adjacent to Hunt land. It must be noted that when field counts are made, it is sometimes difficult to determine the exact quarter section lines and in the absence of fencing makes counts adjacent to Hunt lease land questionable as to exact livestock location. These inspection records are on file in the Cheyenne River Agency Land Operation Office, if you wish to review them.
>
> Since many of the livestock counts were invalid or questionable it was our determination to adjust the trespass to the one time charge.

(Area Director's Sept. 28, 1994, Decision at 1).

The Tribe appealed this decision to the Board. Both the Tribe and the Area Director filed briefs. 6/

5/ The Tribe received a copy of the Superintendent's May 13, 1994, memorandum, and thus it seems likely that the Tribe knew or should have known about the Area Director's decision by May 1994. Even so, the Tribe's notice of appeal was not untimely because the Tribe was not sent a copy of the Apr. 1, 1994, decision or informed of its right to appeal, as required by 25 CFR 2.7.

6/ The Area Director's somewhat belated brief was accompanied by a request for permission to file a late brief. Because appellant has not objected, and the Area Director's brief was only a few days late, the Board accepts it. Hunt has not participated in this appeal, although he has been advised of all proceedings and has been served with all filings.

Discussion and Conclusions

On appeal to the Board, the Tribe first objects to the fact that the Area Director failed to send it a copy of his April 1, 1994, decision. As owner of most of the land included in range unit 297, the Tribe was entitled to receive notice of the decision, as were the permittee, Ted Knife, Sr., and the owners of the allotted land included in the unit. 7/

In fact, the Tribe and other interested parties were entitled to notice while the matter was pending before the Area Director on appeal. Hunt should have served his notice of appeal on them and opposing parties should have been given an opportunity to file answer briefs under 25 CFR 2.11. Not only did opposing parties apparently not receive notice of the pending appeal, but the Area Director issued his decision prior to expiration of the time allowed for filing answer briefs. This was clear error. Cheyenne River Sioux Tribe v. Aberdeen Area Director, 23 IBIA 103 (1992). In this case, it seems at least possible that some of the factual uncertainties in this case might have been resolved had the Area Director handled this appeal in accordance with the regulations in 25 CFR Part 2. 8/ Further, full development of the issues, both legal and factual, might have enabled the Area Director to avoid some of the problems discussed below. 9/

The Tribe contends that the Area Director erred (1) in basing his decision upon the premise that Hunt and Knife shared the responsibility for fencing; (2) in considering Hunt's intent with regard to trespass because "[g]ood faith * * * is generally not a defense to a charge of trespass" (Appellant's Opening Brief at 4); (3) in concluding that forage consumed would have been minimal; and (4) in finding the Agency's livestock counts questionable.

In his answer brief, the Area Director contends that "his review of the range inspection reports * * * led him to believe that the Bureau

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7/ The Board understood from the Tribe's filings in this matter that all the land in the unit was tribal land. It was not until reviewing the record preparatory to issuing this decision that the Board discovered a notation in the record indicating that 537.40 acres of the unit are allotted land.

8/ For instance, the question of whether there was adequate fencing, upon which the Superintendent and the Area Director strongly disagreed, could have been fully addressed and, perhaps, a field inspection made if necessary. So too, full briefing and/or a field inspection might have resolved the question of whether the configuration of the pastures would have allowed the drifting of cattle onto the range unit.

9/ The Board has, on several occasions, brought the problem of premature decisions to the attention of this Area Director. In addition to Cheyenne River Sioux Tribe, see Scott v. Acting Aberdeen Area Director, 25 IBIA 115 (1994); Meeks v. Aberdeen Area Director, 23 IBIA 200 (1993); Jerome v. Acting Aberdeen Area Director, 23 IBIA 137 (1992)

had substantial problems of proof regarding the number of cattle in trespass" (Area Director's Brief at 3). He contends that a decision to assess trespass damages "involves the independent exercise of specialized agency expertise, interpretation of documentary evidence, and prosecutorial discretion" (Area Director's Answer Brief at 4). Further, citing 25 CFR 166.24(d)(5), 10/ the Area Director contends that the Tribe has the right to pursue its own remedy against Hunt in an appropriate forum and will therefore not be harmed if the Area Director's decision is affirmed.

25 CFR 166.24(b) provides:

> Unauthorized grazing. The owner of any livestock grazing in trespass on trust or restricted Indian lands is liable to a penalty of $1 per head for each animal thereof for each day of trespass (except in * * * South Dakota * * * where the penalty shall be $1 per head of cattle regardless of the number of days of trespass), together with the reasonable value of the forage consumed by their [sic] livestock and damages to property injured or destroyed, and for expenses incurred in impoundment and disposal. The Superintendent shall take action to collect all such penalties and damages, reimbursement for expenses incurred in impoundment and disposal, and seek injunctive relief when appropriate. All payments for such penalties and damages shall be credited to the landowners where the trespass occurs except that the value of forage or crops consumed or destroyed may be paid to the lessee of the lands not to exceed the rental paid, and reimbursement for expenses incurred in impoundment and disposal shall be credited as appropriate.

[1] The Board has held that, under this provision, the Superintendent's duty to collect penalties and damages is mandatory. Kimmet v. Billings Area Director, 22 IBIA 148, 151 (1992); Kimmet v. Billings Area Director, 19 IBIA 72, 75 (1990). Nothing in 25 CFR Part 166 suggests that BIA is relieved of its duties under subsection 166.24(b) simply because another forum is available in which the Tribe may seek relief against a trespasser. Further, BIA's duty in this case is not only toward the Tribe, but also toward the individual owners of allotted land within the unit. The Board finds that the existence of another remedy against a trespasser to Indian lands does not relieve BIA of its duties under 25 CFR 166.24(b).

10/ 25 CFR 166.24(d) (5) provides: "Neither the imposition of any civil penalty nor any action by the Secretary of the Interior shall preclude either any civil action by the United States, an Indian, or an Indian tribe for damages caused by trespassing livestock or prosecution for any offense involved with such trespass."

The Board assumes, for purposes of this decision, that the Tribe could bring a civil action against Hunt in tribal court for damages caused by the trespasses at issue in this appeal.

The Area Director also contends that he has "prosecutorial discretion" in cases involving trespass damages. To the extent he is contending that his discretion extends to deciding whether or not to impose penalties and assess damages for an established trespass, the Board cannot agree, given the mandatory language of 25 CFR 166.24(b). The Board recognizes, however, that agency expertise may well be involved in determining whether BIA field reports are adequate to establish the fact of trespass.

The Tribe contends that the Area Director erred in his assumption that Hunt and Knife shared the responsibility for fencing. According to the Area Director's decision, the Tribe's Grazing Code requires the operators of adjacent range units to share the cost of fencing 50/50. 11/ However, in this case, the Tribe contends, that provision of the code does not apply because the land leased by Hunt was formerly a part of range unit 297 but was withdrawn from the unit in 1991. The Tribe quotes from section 15-5-1 of its Grazing Code: "Any person withdrawing land from a range unit shall be required to fence it, and fencing must be completed within 180 days from the effective date of the land withdrawal" (Tribe's Opening Brief at 3). The Tribe submits copies of two withdrawal agreements which, the Tribe states, cover the land now leased by Hunt. Each agreement states: "I agree to fence the above described land with a standard 3-wire fence or better, prior to effective date of land withdrawal from range unit." Each agreement is signed by the landowner and dated December 18, 1991. The Tribe further contends that Hunt, as lessee of these lands, shared the landowners' responsibility for fencing.

No party disputes the Tribe's contention that the land leased by Hunt is the land covered by these withdrawal agreements. Therefore, the Board finds that it was error for the Area Director to base his decision to any extent upon the premise that Knife shared the responsibility for fencing between the range unit and the land leased by Hunt.

[2] The Tribe next contends that the Area Director erred in considering Hunt's intent, or lack thereof, with regard to the trespass. Given the number of times the Superintendent wrote to Hunt about his trespass and Hunt's repeated failures to remove his cattle from the range unit, Hunt must be deemed to have had the intent necessary to establish trespass. See, e.g., Fraser v. United States, 261 F.2d 282 (9th Cir. 1958), holding that, where unauthorized cattle are repeatedly found on Indian land, a willful

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11/ The Tribe's Grazing Code for 1993-1998 is not included in the record. However, its 1988 Grazing Code provided at section 15-5-1.3: "Range Unit boundaries must be fenced and meet ASC fencing standards (bordering operators to share 50/50 in the fencing)." See Cheyenne River Sioux Tribe, 23 IBIA at 104.

The Tribe does not dispute the Area Director's statement that a similar provision appears in the present code.

trespass in violation of 25 U.S.C. § 179 (1994) and the implementing BIA regulations is established. 12/

The Tribe's third and fourth objections--i.e., to the Area Director's conclusion that forage consumption would have been minimal and to his finding that "many of the livestock counts were invalid or questionable"--relate only to the Area Director's September 28, 1994, decision. Neither of these reasons was given in the Area Director's original decision issued on April 1, 1994. 13/ If the Area Director relied on these factors in reaching his April 1, 1994, decision, he should have included those reasons in the decision. Under the circumstances here, there is an appearance that the reasons were merely post hoc justifications for the Area Director's April 1, 1994, decision.

The Board has held that it is a denial of due process for BIA to base a decision on reasons not given in the decision. E.g., Price v. Portland Area Director, 18 IBIA 272 (1990). In this case, the parties who would have suffered any denial of due process in this regard, i.e., the landowners and Knife, are the same parties who were clearly denied procedural due process when they were not given notice of the proceedings before the Area Director.

Under the circumstances, the Board has no choice but to vacate the Area Director's decision and remand this matter to him for further proceedings. As discussed above, the Board has found that Hunt's intent, so far as it is necessary to establish trespass, is adequately supported by the record. Therefore, a new decision to reduce trespass damages may not be based on any supposed lack of intent on Hunt's part. Further, for the reasons discussed above, a new decision may not be based upon the premise that Knife, the permittee of range unit 297, bore 50 percent of the responsibility for fencing between the range unit and the leased land.

With respect to damages for forage consumed, 25 CFR 166.24(d) provides:

> The amount due the Indian landowner and/or the United States in settlement for unauthorized grazing use shall be determined by the Superintendent as follows:
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> * * * * * *

12/ Fraser approved a trespass assessment based upon a provision of the then-current BIA grazing regulations which stated: "The following acts are prohibited: * * * (b) allowing livestock not exempt from permit to drift and graze on restricted Indian lands without an approved permit." 25 CFR 71.21 (1956 Supp.). A virtually identical provision appears in the present 25 CFR 166.24(a): "The following acts are prohibited on Indian trust or restricted lands under the jurisdiction of the Bureau of Indian Affairs: * * * (2) allowing livestock to drift and graze on trust or restricted Indian lands without an approved permit."

13/ The Area Director did, however, mention his belief concerning minimal forage consumption in his Apr. 7, 1994, memorandum to the Superintendent.

> (2) a reasonable value of forage consumed based upon the average rate received per month for comparable grazing privileges on the reservation for the kind of livestock concerned, or the estimated commercial value for such privileges if no comparable grazing privileges are sold.

Because the regulations set out a specific formula for calculating the value of forage consumed, BIA is required to employ that formula for any period in which trespass is established. See Eaton v. Acting Aberdeen Area Director, 28 IBIA 283 (1995). It seems likely that the Area Director's reasoning in this case was that, if Hunt was supplying winter feed on his leased land, the cattle may not actually have been in trespass on the range unit during the entire period between November 1, 1993, and February 28, 1994, but may have drifted back and forth as feed was or was not available on the leased land. 14/ This possibility goes to the quality of BIA's proof of trespass, the concern mentioned in the Area Director's brief. The questions in this regard are: If such back and forth drifting was possible, were BIA's scattered sightings of Hunt's cattle adequate to prove trespass throughout the entire 4-month period and, if not, for what portion of that period? These are questions which clearly may be considered by the Area Director on remand. In connection therewith, however, he should also address the Superintendent's belief that drifting of livestock was unlikely, as well as any other related factual questions.

With respect to the validity and/or accuracy of the BIA livestock counts, the Area Director has authority to make judgments based upon his expertise in the subject area. However, he must support his judgments with reasons. E.g., ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, 23 IBIA 228, 239-40 (1993). See Bowen v. American Hospital Association, 476 U.S. 610, 626-627 (1986). The general comments made in the Area Director's September 28, 1994, decision concerning the difficulties of establishing livestock location are insufficient to support his conclusion that these particular livestock counts were invalid or questionable. 15/ Cf. Dupuis-Ryan v. Acting Portland Area Director, 25 IBIA 139 (1994) (In rejecting a loan guaranty application, BIA cannot rely on generalizations but must address the specific facts of the application before it).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's

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14/ In Eaton, there was no doubt that Eaton's cattle were in trespass for the entire period for which she was charged trespass damages. Eaton contended, however, that her damages should be reduced because the trespass occurred during the winter when the range grass was scarce and snow covered. The Board rejected that argument.

15/ The Board notes that the Area Director's statements in this regard were based in part upon "the absence of fencing." As discussed above, there is substantial disagreement between the Area Director and the Superintendent concerning the extent of fencing.

April 1, 1994, and September 28, 1994, decisions are vacated, and this matter is remanded to him for further proceedings as discussed in this decision. 16/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative

16/ On remand, the Area Director shall permit the participation of the Tribe, Knife, and the individual landowners. In connection therewith he shall send copies of this decision to the individual landowners.